Leolaris (M) Sdn Bhd v Bumiputra Commerce Bank Bhd

HIGH COURT (KUALA LUMPUR) — SUIT NO D5–22–219 OF 2003
HAMID SULTAN J
14 AUGUST 2012

Banking — Cheques — Forged cheques — Plaintiff sued bank for honouring forged cheques drawn on its account over 15 1/2 months amounting to RM1.1m — Bank claimed complete defence under s 73A of the Bills of Exchange Act 1949 — Whether plaintiff negligently contributed to forgery — Whether plaintiff failed to take reasonable precautions to prevent forgery or its continuance

The plaintiff maintained a current account ('the account') with the defendant. In the instant suit the plaintiff claimed that over a period of 15 1/2 months the defendant honoured 248 forged cheques drawn on the account involving a total of RM1.1m and had debited the plaintiff's account in that sum. The plaintiff claimed the defendant failed to take necessary precautions to protect the plaintiff from being defrauded and honoured the cheques despite having grounds to believe the plaintiff's funds were being misappropriated. The plaintiff sought a declaration that the defendant was not entitled to debit the account with the amounts on the impugned cheques and sought the refund of the RM1.1m with interest. Under the plaintiff's mandate to the defendant, four of its representatives were authorised to sign cheques. Cheques for RM5,000 and below required the signature of only one of the signatories while cheques in excess of RM5,000 required the signatures of any two of them. Of the 248 impugned cheques, a cheque for RM35,357 breached the mandate by not having the minimum two signatories. The defendant relied on s 37A of the Bills of Exchange Act 1949 ('the Act') as a complete defence to the action claiming that the plaintiff negligently contributed to the occurrence of the forgeries. Among other, the defendant contended that (i) the plaintiff failed to make any complaints about the account despite receiving monthly statements from the defendant (ii) even if the plaintiff did not receive the statements, as it claimed, it failed to notify the defendant of same (iii) for nine months only a corporate administrator, who was the villain in the case, was entrusted with drawing cheques and keeping the plaintiff's cheque books without there being any supervision over her actions and (iv) the plaintiff had no internal check and balance mechanism to prevent abuse and misuse of its cheques.

Held, allowing the claim only for the sum of RM35,357 with interest and with no order as to costs:

(1) The plaintiff had knowingly or negligently contributed to or facilitated

the forgeries. There was sufficient evidence the monthly bank statements were regularly sent. There was also the contractual obligation in express terms for the plaintiff to examine the statement of account and notify the bank of any errors, irregularities or discrepancies. Similar reminders were also stated in the monthly statements. The evidence was clear the plaintiff, notwithstanding the contractual obligation, failed to take reasonable precautions in the management of its business to prevent the continuing forgery and alert the bank to avoid a s 73A defence by the bank (see para 11(j) & (i)).

(2) The defendant had made out a case to rely on the statutory defence encapsulated in s 73A. As to that part of s 73A relating to good faith in paying out on the cheques, the court was satisfied the defendant had a system in place and had conducted itself as a reasonable and prudent banker dealing with the day-to-day affairs of the operation of the plaintiff's account. The Act itself placed a low threshold for the defendant to satisfy when relying on the term 'good faith' (see para 11(j)).

(3) Section 73A directly or indirectly brought in a wider concept of duty requiring a customer to take reasonable precautions in the management of his business to prevent forgery and also a duty to check periodical bank statements and alert the bank to arrest forgery at the earliest opportunity failing which the bank might succeed in raising the s 73A defence (see para 11(h)).

[Bahasa Malaysia summary

Plaintif mempunyai akaun semasa ('akaun') dengan defendan. Dalam tindakan ini, plaintif mendakwa bahawa defendan telah mengesahkan 248 cek yang dipalsukan daripada akaun yang melibatkan jumlah RM1.1 juta selama tempoh 15 1/2 tahun dan telah mendebitkan jumlah tersebut ke dalam akaun plaintif. Plaintif menghujahkan bahawa defendan gagal mengambil langkah berjaga-jaga yang perlu untuk melindungi plaintif daripada ditipu dan mengesahkan cek-cek tersebut walaupun mempunyai alasan untuk mempercayai dana plaintif telah disalahgunakan. Plaintif memohon deklarasi bahawa defendan tidak berhak untuk mendebitkan akaun dengan jumlah pada cek yang dipertikaikan dan meminta bayaran semula RM1.1 juta dengan faedah. Di bawah mandat plaintif kepada defendan, empat wakil diberikan kuasa untuk menandatangani cek. Cek RM5,000 dan ke bawah memerlukan tandatangan hanya salah seorang daripada penandatangan manakala cek melebihi RM5,000 memerlukan tandatangan mana-mana dua daripada mereka. Daripada 248 cek yang dipertikaikan, cek RM35,357 telah melanggar mandat kerana tidak mempunyai minimum dua penandatangan. Defendan merujuk kepada s 37A Akta Bil Pertukaran 1949 ('Akta') sebagai pembelaan yang lengkap kepada tindakan tersebut dengan mendakwa bahawa plaintif menyumbang cuai kepada berlakunya pemalsuan. Antara lain, defendan menghujahkan bahawa (i) plaintif gagal untuk membuat apa-apa aduan

mengenai akaun walaupun menerima penyata bulanan daripada defendan; (ii) walaupun plaintif tidak menerima penyata, seperti yang didakwa, ia gagal untuk memberitahu defendan; (iii) selama sembilan bulan hanya seorang pentadbir korporat, yang merupakan dalang dalam kes ini, adalah diamanahkan dengan pengeluaran cek dan simpanan buku cek plaintif tanpa terdapatnya apa-apa pengawasan ke atas tindakannya; dan (iv) plaintif tidak mempunyai mekanisma *check and balance* untuk menghalang penyalahgunaan cek.

Diputuskan, membenarkan tuntutan hanya untuk jumlah wang sebanyak RM35,357 dengan faedah tanpa perintah terhadap kos:

(1) Plaintif telah dengan sedar atau dengan cuai menyumbang atau memudahkan pemalsuan. Terdapat bukti yang mencukupi bahawa penyata bank bulanan kerap dihantar. Terdapat juga obligasi kontrak dalam syarat-syarat nyata bagi plaintif untuk memeriksa penyata akaun dan memaklumkan kepada bank tentang apa-apa kesilapan, penyelewengan atau percanggahan. Peringatan serupa turut dinyatakan dalam penyata bulanan. Bukti jelas bahawa plaintif, walau apa pun obligasi kontraknya, gagal untuk mengambil langkah berjaga-jaga yang munasabah dalam pengurusan perniagaannya untuk mencegah pemalsuan berterusan dan memaklumkan kepada bank untuk mengelakkan pembelaan s 73A oleh bank (lihat perenggan 11(j) & (i)).

(2) Defendan telah membentuk kes yang bergantung kepada pembelaan berkanun yang terkandung dalam s 73A. Oleh kerana sebahagian daripada s 73A berkaitan dengan niat baik dalam membayar cek, mahkamah berpuas hati bahawa defendan mempunyai sistem sendiri dan telah bertanggungjawab sebagai jurubank yang munasabah dan berhemat dalam berurusan dengan hal ehwal harian operasi akaun plaintif. Akta tersebut meletakkan ambang yang rendah untuk dipenuhi oleh defendan dalam bergantung kepada istilah 'suci hati' (lihat perenggan 11(j)).

(3) Seksyen 73A secara langsung atau tidak langsung membawa konsep tanggungjawab yang memerlukan pelanggan untuk mengambil langkah berjaga-jaga yang munasabah dalam pengurusan perniagaannya untuk mencegah pemalsuan dan juga kewajipan untuk memeriksa penyata bank berkala dan memberi amaran kepada bank untuk mengesan pemalsuan di peluang terawal yang mana jika gagal, bank mungkin berjaya dalam membangkitkan pembelaan s 73A (lihat perenggan 11(h)).]

Notes

For cases on forged cheques, see 1(2) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 2586–2587.

Cases referred to

Auchteroni & Co v Midland Bank, Ltd [1928] All ER Rep 627, KBD (refd)
Canara Bank v Canara Sales Corpn AIR 1987 SC 1603, SC (refd)
Globelink Container Line (M) Sdn Bhd v Bumiputra Commerce Bank Berhad [2011] MLJU 400; [2011] 1 LNS 414, HC (refd)
Jones v Gordon (1877) 2 App Cas 616 (refd)
Khoo Tian Hock & Anor v Oversea-Chinese Banking Corporation Limited [2000] 4 SLR 673 (refd)
Leolaris (M) Sdn Bhd v RHB Bank Bhd [2009] 7 AMR 671, HC (refd)
Malaysia Plastics Sdn Bhd v United Overseas Bank (M) Bhd [2012] 9 MLJ 336; [2012] 4 CLJ 1997, HC (refd)
Skyring v Greenwood (1825) 4 B & C 281, PC (refd)
Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd and Others [1985] 2 All ER 947, PC (refd)
United Asian Bank Bhd v Tai Soon Heng [1993] 1 MLJ 182, SC (refd)

Legislation referred to

Bills of Exchange Act 1949 ss 24, 73A, 95
Evidence Act 1950

RS Sodhi (Sukhdev & Co) for the plaintiff.
Wong Hok Mun (Arham Rahimy Hariri with him) (Azim, Tunku Farik & Wong) for the defendant.

Hamid Sultan J:

[1] This is my judgment in respect of the plaintiff's claim against the defendant for honouring forged cheques, and debiting the same in the plaintiff's account. The relevant part of the statement of claim, inter alia, reads as follows:

> 3. The terms of the contract (hereinafter referred to as the said conttact) between the Plaintiff and the Defendant in respect of the opening of the current account referred to in paragraph 2 above are inter alia as follows:-
>
> 3.1 Express Terms
>
> (a) that the authorised signatories of cheques drawn by the plaintiff are Gordon Stuart Bell, William leslie Addington, John E. Dixon and Ling Hee Kiat and
>
> (b) that the signatories for cheques drawn by the Plaintiff for RM5,000 and below would be any one of the four authorised signatories and for cheques in excess of RM5,000/- would be any two of the four authorised signatories.

3.2 Implied Terms

(a) that the defendant shall protect the Plaintiff from being defrauded and

(b) that the defendant shall only make payments on cheques Which are regular and unambigous in form.

4. The Defendant paid the following cheques purported to be drawn by the Plaintiff and debited the plaintiff's accounts with the amount thereof:-

No.	Cheque No.	Date	Date Cleared	Amount (RM)	Payee
1	146515	2/1/2001	4/1/2001	3,219.23	Siew Mei Chuen
2.	150283	10/1/2001	12/1/2001	3,702.32	Siew Mei Chuen
3	150296	15/1/2001	17/1/2001	4,559.50	Siew Mei Chuen
4	150300	17/1/2001	18/1/2001	1,070.00	Cash
5	150752	18/1/2001	20/1/2001	3,357.00	Cash
6	158703	29/1/2001	31/1/2001	740.00	Cash
7	158738	12/2/2001	13/2/2001	4,520.00	Multimedia Station Centre
8	158743	13/2/2001	14/2/2001	4,761.23	Cash
9	158746	14/2/2001	15/2/2001	4,470.00	Multimedia Station Centre
10.	158706	3/2/2001	5/2/2001	4,190.00	Multimedia Station Centre
11.	158707	3/2/2001	5/2/2001	4,190.00	Multimedia Station Centre
12.	158771	19/2/2001	20/2/2001	2,600.00	Multimedia Station Centre
13.	158789	20/2/2001	21/2/2001	4,500.00	Cash
14.	167052	1/3/2001	2/3/2001	3,200.00	Cash
15.	167062	8/3/2001	9/3/2001	1,800.00	Cash
16.	167075	12/3/2001	12/3/2001	4,131.00	Siew Mei Chuen
17.	167074	12/1/2001	12/3/2001	4,131.00	Siew Mei Chuen
18.	167079	12/1/2001	13/3/2001	2,000.00	Multimedia Station Centre
19.	167082	16/3/2001	16/3/2001	3,781.43	Siew Mei Chuen
20.	173631	21/3/2001	22/3/2001	4,140.00	Multimedia Station Centre
21.	173632	21/3/2001	22/3/2001	1,710.00	Multimedia Station Centre
22.	173691	2/4/2001	2/4/2001	4,800.00	Cash

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23.	173694	2/4/2001	4/4/2001	4,200.00	Siew Mei Chuen
24.	173693	2/4/2001	4/4/2001	3,324.00	Siew Mei Chuen
25.	177752	9/4/2001	10/4/2001	3,397.00	Siew Mei Chuen
26.	177754	10/4/2001	13/4/2001	3,200.00	Formico Sdn Bhd
27.	177753	10/4/2001	13/4/2001	3,200.00	Formico Sdn Bhd
28.	177770	18/4/2001	19/4/2001	5,000.00	Cash
29.	177771	18/4/2001	19/4/2001	4,970.00	Cash
30.	177769	18/4/2001	19/4/2001	3,560.00	Multimedia Station Centre
31.	187204	24/4/2001	26/4/2001	3,800.00	Formico Sdn Bhd
32.	187203	24/4/2001	26/4/2001	3,800.00	Formico Sdn Bhd
33.	187212	30/4/2001	30/4/2001	4,950.00	Cash
34.	187211	30/4/2001	30/4/2001	4,950.00	Cash
35.	187217	2/5/2001	2/5/2001	4,200.00	Cash
36.	187210	1/5/2001	2/5/2001	3,000.00	Reapfield Properties Sdn Bhd
37.	187208	1/5/2001	2/5/2001	5,000.00	Reapfield Properties Sdn Bhd
38.	187209	1/5/2001	2/5/2001	5,000.00	Reapfield Properties Sdn Bhd
39.	187214	2/5/2001	3/5/2001	1,970.00	Reapfield Properties Sdn Bhd
40.	187215	2/5/2001	3/5/2001	3,980.00	Multimedia Station Centre
41.	187213	2/5/2001	3/5/2001	5,000.00	Reapfield Properties Sdn Bhd
42.	187202	4/6/2001	8/5/2001	3,260.21	Cash
43.	187220	5/5/2001	8/5/2001	2,660.00	Multimedia Station Centre
44.	187219	5/5/2001	8/5/2001	3,400.00	Cash
45.	187218	5/5/2001	8/5/2001	2,700.00	Cash
46.	187243	10/5/2001	11/5/2001	5,000.00	Siew Mei Chuen
47.	187242	10/5/2001	11/5/2001	5,000.00	Siew Mei Chuen
48.	187244	10/5/2001	11/5/2001	3,250.00	Cash
49.	187460	16/5/2001	18/5/2001	5,000.00	Siew Mei Chuen
50.	187459	15/5/2001	18/5/2001	4,770.80	Siew Mei Chuen
51.	187461	16/5/2001	18/5/2001	2,500.00	Cash
52.	187479	21/5/2001	22/5/2001	3,000.00	Cash
53.	187480	22/5/2001	23/5/2001	3,249.00	Cash

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54.	187462	10/5/2001	22/5/2001	1,060.00	Multimedia Station Centre
55.	187489	26/5/2001	28/5/2001	3,651.60	Siew Mei Chuen
56.	187312	1/6/2001	5/6/2001	1,700.00	Cash
57.	187308	2/6/2001	5/6/2001	4,500.00	Cash
58.	187310	1/6/2001	5/6/2001	5,000.00	Cash
59.	187311	1/6/2001	5/6/2001	5,000.00	Cash
60.	187304	1/6/2001	5/6/2001	500.00	Chan Koo Yeng
61.	187306	1/6/2001	5/6/2001	3,800.00	Cash
62.	187302	1/6/2001	5/6/2001	5,000.00	Chan Koo Yeng
63.	187313	5/6/2001	6/6/2001	5,000.00	Cash
64.	187314	5/6/2001	6/6/2001	5,000.00	Cash
65.	187321	7/6/2001	7/6/2001	5,000.00	Cash
66.	187320	6/6/2001	8/6/2001	2,200.00	Cash
67.	187322	6/6/2001	8/6/2001	2,700.00	Cash
68.	187323	9/6/2001	11/6/2001	1,700.00	Siew Mei Chuen
69.	187316	6/6/2001	12/6/2001	3,200.00	Formico Sdn Bhd
70.	187317	6/6/2001	12/6/2001	3,200.00	Formico Sdn Bhd
71.	187318	6/6/2001	12/6/2001	3,800.00	Formico Sdn Bhd
72.	187319	6/6/2001	12/6/2001	3,800.00	Formico Sdn Bhd
73.	187324	11/6/2001	13/6/2001	3,210.00	Cash
74.	187442	14/6/2001	15/6/2001	4,780.00	Cash
75.	187326	13/6/2001	15/6/2001	4,600.00	Formico Sdn Bhd
76.	187445	15/6/2001	19/6/2001	4,780.00	Siew Mei Chuen
77.	199212	26/6/2001	26/6/2001	4,600.00	Cash
78.	199185	26/6/2001	27/6/2001	4,400.00	Premium Connection Ent.
79.	187328	28/6/2001	29/6/2001	3,892.00	Cash
80.	187327	28/6/2001	29/6/2001	4,891.23	Siew Mei Chuen
81.	187332	28/6/2001	29/6/2001	500.00	Chan Koo Yeng
82.	187329	28/6/2001	29/6/2001	5,000.00	Chan Koo Yeng
83.	199222	4/7/2001	4/7/2001	4,800.00	Siew Mei Chuen
84.	199229	5/7/2001	6/7/2001	5,000.00	Siew Mei Chuen
85.	199227	5/7/2001	6/7/2001	4,560.00	Cash
86.	199228	5/7/2001	6/7/2001	5,000.00	Siew Mei Chuen
87.	199241	13/7/2001	16/7/2001	4,560.00	Premium Connection Ent.
88.	199242	16/7/2001	17/7/2001	4,700.00	Siew Mei Chuen
89.	199257	17/7/2001	19/7/2001	3,700.00	Cash
90.	206958	25/7/2001	25/7/2001	5,000.00	Cash
91.	206959	25/7/2001	25/7/2001	5,000.00	Cash
92.	206960	25/7/2001	26/7/2001	5,000.00	Cash
93.	206961	25/7/2001	26/7/2001	2,000.00	Cash

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94.	276002	1/8/2001	3/8/2001	3,800.00	Cash
95.	276001	1/8/2001	3/8/2001	4,200.00	Siew Mei Chuen
96.	206977	1/8/2001	3/8/2001	3,270.00	Premium Connection Ent.
97.	206978	1/8/2001	3/8/2001	3,390.00	Premium Connection Ent.
98.	206996	1/8/2001	9/8/2001	5,000.00	Cash
99.	206975	1/8/2001	9/8/2001	5,000.00	Hor Kok Hen
100.	206997	4/8/2001	10/8/2001	5,000.00	Siew Mei Chuen
101.	280013	13/8/2001	14/8/2001	5,000.00	Siew Mei Chuen
102.	207000	10/8/2001	14/8/2001	1,980.00	Cash
103.	206993	1/8/2001	14/8/2001	3,800.00	Formico Sdn Bhd
104.	206995	1/8/2001	14/8/2001	4,800.00	Formico Sdn Bhd
105.	206976	1/8/2001	16/8/2001	500.00	Chan Koo Yeng
106.	280001	13/8/2001	16/8/2001	2,000.00	Cash
107.	280012	13/8/2001	16/8/2001	5,000.00	Chan Koo Yen
108.	280014	13/8/2001	17/8/2001	5,000.00	Siew Mei Chuen
109.	280028	17/8/2001	20/8/2001	5,000.00	Siew Mei Chuen
110.	280029	17/8/2001	20/8/2001	5,000.00	Siew Mei Chuen
111.	276038	20/8/2001	21/8/2001	5,000.00	Siew Mei Chuen
112.	276039	20/8/2001	21/8/2001	5,000.00	Siew Mei Chuen
113.	276040	20/8/2001	22/8/2001	4,180.00	Premium Connection Ent.
114.	280083	23/8/2001	24/8/2001	5,000.00	Cash
115.	280084	23/8/2001	27/8/2001	5,000.00	Siew Mei Chuen
116.	280085	23/8/2001	27/8/2001	5,000.00	Siew Mei Chuen
117.	280087	28/8/2001	29/8/2001	5,000.00	Siew Mei Chuen
118.	280088	28/8/2001	29/8/2001	5,000.00	Siew Mei Chuen
119.	280089	28/8/2001	29/8/2001	5,000.00	Siew Mei Chuen
120.	280091	28/8/2001	30/8/2001	5,000.00	Cash
121.	280092	28/8/2001	30/8/2001	5,000.00	Cash
122.	206999	10/8/2001	11/8/2001	35,357.00	Topclass Supply Sdn Bhd
123.	293510	4/9/2001	5/9/2001	5,000.00	Siew Mei Chuen
124.	293511	4/9/2001	5/9/2001	5,000.00	Siew Mei Chuen
125.	293503	3/9/2001	5/9/2001	3,800.00	Formico Sdn Bhd
126.	293502	3/9/2001	5/9/2001	4,800.00	Formico Sdn Bhd
127.	293513	4/9/2001	6/9/2001	500.00	Chan Koo Yeng
128.	293512	4/9/2001	6/9/2001	5,000.00	Chan Koo Yeng
129.	293520	4/9/2001	8/9/2001	2,480.00	Premium Connection Ent.
130.	293521	4/9/2001	10/9/2001	3,000.00	Cash

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131.	293522	10/9/2001	11/9/2001	5,000.00	Siew Mei Chuen
132.	293523	10/9/2001	11/9/2001	5,000.00	Siew Mei Chuen
133.	293527	17/9/2001	18/9/2001	5,000.00	Siew Mei Chuen
134.	293528	17/9/2001	18/9/2001	5,000.00	Siew Mei Chuen
135.	293529	17/9/2001	18/9/2001	5,000.00	Siew Mei Chuen
136.	293530	17/9/2001	24/9/2001	5,000.00	Siew Mei Chuen
137.	293531	17/9/2001	24/9/2001	5,000.00	Siew Mei Chuen
138.	293526	10/9/2001	27/9/2001	1,645.00	Cash
139.	293524	10/9/2001	27/9/2001	3,800.00	Formico Sdn Bhd
140.	293525	10/9/2001	27/9/2001	4,800.00	Formico Sdn Bhd
141.	293534	2/10/2001	5/10/2001	5,000.00	Siew Mei Chuen
142.	293535	2/10/2001	5/10/2001	5,000.00	Siew Mei Chuen
143.	293536	10/10/2001	12/10/2001	5,000.00	Siew Mei Chuen
144.	293537	10/10/2001	12/10/2001	5,000.00	Siew Mei Chuen
145.	293538	15/10/2001	16/10/200	5,000.00	Siew Mei Chuen
146.	293539	15/10/2001	16/10/200	5,000.00	Siew Mei Chuen
147.	293540	15/10/2001	16/10/200	5,000.00	Siew Mei Chuen
148.	293543	22/10/2001	23/10/2001	4,200.00	Cash
149.	293541	22/10/2001	23/10/2001	5,000.00	Siew Mei Chuen
150.	293542	22/10/2001	23/10/2001	5,000.00	Siew Mei Chuen
151.	293544	23/10/2001	24/10/2001	4,500.00	Premium Connection Ent.
152.	293546	23/10/2001	26/10/2001	4,731.23	Juliana Siew
153.	293545	29/10/2001	1/11/2001	5,000.00	Siew Mei Chuen
154.	293547	29/10/2001	1/11/2001	5,000.00	Siew Mei Chuen
155.	293548	29/10/2001	1/11/2001	5,000.00	Siew Mei Chuen
156.	293549	5/11/2001	5/11/2001	5,000.00	Siew Mei Chuen
157.	293550	5/11/2001	5/11/2001	5,000.00	Siew Mei Chuen
158.	187333	19/11/2001	19/11/2001	5,000.00	Siew Mei Chuen
159.	187334	19/11/2001	19/11/2001	5,000.00	Siew Mei Chuen
160.	187339	28/11/2001	28/11/2001	5,000.00	Siew Mei Chuen
161.	187340	28/11/2001	28/11/2001	5,000.00	Siew Mei Chuen
162.	187337	29/11/2001	30/11/2001	5,000.00	Siew Mei Chuen
163.	187341	5/11/2001	6/12/2001	5,000.00	Siew Mei Chuen
164.	187342	5/11/2001	6/12/2001	5,000.00	Siew Mei Chuen
165.	187343	5/11/2001	6/12/2001	5,000.00	Siew Mei Chuen
166.	187346	11/12/2001	12/12/2001	5,000.00	Siew Mei Chuen
167.	187347	11/12/2001	12/12/2001	5,000.00	Siew Mei Chuen
168.	187348	11/12/2001	12/12/2001	5,000.00	Siew Mei Chuen

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169.	187344	11/12/2001	12/12/2001	5,000.00	Chan KooYen
170.	292451	28/12/2001	31/12/2001	5,000.00	Siew Mei Chuen
171.	292452	28/12/2001	31/12/2001	5,000.00	Siew Mei Chuen
172.	292453	28/12/2001	31/12/2001	5,000.00	Siew Mei Chuen
173.	187349	29/12/2001	31/12/2001	4,700.00	The PCE Shop
174.	292454	31/12/2001	2/1/2002	2,250.00	The PCE Shop
175.	292457	2/1/2002	3/1/2002	5,000.00	Siew Mei Chuen
176.	292458	2/1/2002	3/1/2002	5,000.00	Siew Mei Chuen
177.	292456	4/1/2002	4/1/2002	5,000.00	Siew Mei Chuen
178.	292459	4/1/2002	4/1/2002	5,000.00	Siew Mei Chuen
179.	187350	4/1/2002	7/1/2002	3,350.00	The PCE Sho
180.	292460	7/1/2002	81/2002	5,000.00	Siew Mei Chuen
181.	292421	7/1/2002	8/1/2002	5,000.00	Siew Mei Chuen
182.	292462	7/1/2002	8/1/2002	5,000.00	Siew Mei Chuen
183.	292465	8/1/2002	9/1/2002	500.00	Chan Koo Yen
184.	292463	8/1/2002	9/1/2002	1,700.00	The PCE Sho
185.	292464	8/1/2002	9/1/2002	5,000.00	Chan Koo Yeng
186.	292466	10/1/2002	11/1/2002	5,000.00	Siew Mei Chuen
187.	292467	10/1/2002	11/1/2002	5,000.00	Siew Mei Chuen
188.	292469.	10/1/2002	11/1/2002	5,000.00	Siew Mei Chuen
189.	292468	11/1/2002	11/1/2002	5,000.00	Siew Mei Chuen
190.	292470	14/1/2002	16/1/2002	5,000.00	Siew Mei Chuen
191.	292471	14/1/2002	16/1/2002	5,000.00	Siew Mei Chuen
192.	292472	18/1/2002	22/1/2002	3,350.00	The PCE Sho
193.	292473	23/1/2002	24/1/2002	5,000.00	Siew Mei Chuen
194	292475	23/1/2002	24/1/2002	5,000.00	Siew Mei Chuen
195	292476	24/1/2002	25/1/2002	2,750.00	The PCE Sho
196	292478	30/1/2002	31/1/2002	5,000.00	Siew Mei Chuen
197	292479	30/1/2002	31/1/2002	5,000.00	Siew Mei Chuen
198	292481	31/1/2002	4/2/2002	5,000.00	Siew Mei Chuen
199	292485	31/1/2002	4/2/2002	5,000.00	Siew Mei Chuen
200	292482	1/2/2002	4/2/2002	3,800.00	Formico Sdn Bhd
201	292483	1/2/2002	4/2/2002	4,800.00	Formico Sdn Bhd
202	292487	6/2/2002	7/2/2002	5,000.00	Siew Mei Chuen
203	292488	6/2/2002	7/2/2002	5,000.00	Siew Mei Chuen
204	292466	10/1/2002	11/1/2002	5,000.00	Siew Mei Chuen
205	292467	10/1/2002	11/1/2002	5,000.00	Siew Mei Chuen
206	292469	10/1/2002	11/1/2002	5,000.00	Siew Mei Chuen

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207	292494	11/2/2002	14/2/2002	5,000.00	Siew Mei Chuen
208	292495	11/2/2002	14/2/2002	5,000.00	Siew Mei Chuen
209	292471	14/1/2002	16/1/2002	5,000.00	Siew Mei Chuen
210	292472	18/1/2002	22/1/2002	3,350.00	The PCE Sho
211	292473	23/1/2002	24/1/2002	5,000.00	Siew Mei Chuen
212	292497	22/2/2002	27/2/2002	5,000.00	Siew Mei Chuen
213	292499	22/2/2002	27/2/2002	5,000.00	Siew Mei Chuen
214	293561	28/2/2002	10/3/2002	5,000.00	Siew Mei Chuen
215	293562	28/2/2002	10/3/2002	5,000.00	Siew Mei Chuen
216	293563	28/2/2002	10/3/2002	5,000.00	Siew Mei Chuen
217	293567	6/3/2002	8/3/2002	4,290.00	The PCE Sho
218	293570	8/3/2002	9/3/2002	4,290.00	The PCE Sho
219	293571	14/3/2002	14/3/2002	5,000.00	Siew Mei Chuen
220	293572	13/3/2002	19/3/2002	3,800.00	Formico Sdn Bhd
221	292500	14/3/2002	19/3/2002	4,290.00	The PCE Sho
222	293573	13/3/2002	19/3/2002	4,500.00	Formico Sdn Bhd
223	293574	13/3/2002	19/3/2002	4,800.00	Formico Sdn Bhd
224	293575	13/3/2002	19/3/2002	5,000.00	Formico Sdn Bhd
225	293579	20/3/2002	21/3/2002	5,000.00	Siew Mei Chuen
226	293580	21/3/2002	22/3/2002	5,000.00	Siew Mei Chuen
227	293581	21/3/2002	22/3/2002	5,000.00	Siew Mei Chuen
228	293583	21/3/2002	23/3/2002	4,970.00	The PCE Shop
229	293577	10/3/2002	25/3/2002	500.00	Chan Koo Yeng
230	293576	10/3/2002	25/3/2002	5,000.00	Chan Koo Yeng
231	293586	28/3/2002	26/3/2002	3,000.00	Siew Mei Chuen
232	293584	25/3/2002	26/3/2002	5,000.00	Siew Mei Chuen
233.	293585	25/3/2002	26/3/2002	5,000.00	Siew Mei Chuen
234.	293589	1/4/2002	2/4/2002	4,200.00	The PCE Shop
235.	293587	26/3/2002	3/4/2002	4,800.00	Formico Sdn Bhd
236.	293588	26/3/2002	3/4/2002	4,800.00	Formico Sdn Bhd
237.	293590	2/4/2002	5/4/2002	5,000.00	Siew Mei Chuen
238.	293591	2/4/2002	5/4/2002	5,000.00	Siew Mei Chuen
239.	293592	4/4/2002	9/4/2002	4,710.00	The PCE Shop
240.	293593	10/4/2002	11/4/2002	5,000.00	Siew Mei Chuen

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241.	293594	10/4/2002	11/4/2002	5,000.00	Siew Mei Chuen
242.	293595	10/4/2002	11/4/2002	5,000.00	Siew Mei Chuen
243.	293596	10/4/2002	11/4/2002	5,000.00	Siew Mei Chuen
244.	293597	11/4/2002	12/4/2002	5,000.00	Siew Mei Chuen
245.	293598	11/4/2002	12/4/2002	5,000.00	Siew Mei Chuen
246.	293599	11/4/2002	12/4/2002	5,000.00	Siew Mei Chuen
247.	293600	11/4/2002	12/4/2002	5,000.00	Siew Mei Chuen
248.	292491	16/4/2002	17/4/2002	5,000.00	Siew Mei Chuen

5. The payments referred to in paragraph 4 above were made by the Defendant in breach of the express and/or implied terms of the said contract.

PARTICULARS

(a) The Plaintiff did not draw the said cheques or authorize the drawing thereof and the signature thereon was forged. In the premises the Defendant had no authority to pay the said cheques.

(b) The Defendant failed to take all necessary precautions to protect the Plaintiff from being defrauded.

(c) The Defendant made payments on cheques which were irregular and ambiguous in form;

(d) The Defendant made payments on the said cheques contrary to the mandate given by Plaintiff.

(e) The Defendant made payments when the Defendant had grounds for believing that the funds of the Plaintiff were being misappropriated taking into account in particular but not limited to the defendants knowledge of the signatories, the amount involved, the presence of unusual features and the scope and means for making reasonable inquires.

6. By reason of the matters aforesaid the plaintiff has suffered loss and damage.

7. Wherefore the Plaintiff claims:-

(a) a declaration that the Defendant is not entitled to debit the Plaintiffs current account with the amount of the respective cheques as enumerated in paragraph 4 of the statement of claim amounting to RM1,091,921.78;

(b) payment of the sum of RM 1,091,921.78 as due and owing by the Defendant to the Plaintiff;

(c) interest on the respective sum as stated in the respective cheques as enumerated in paragraph 3 4 of the Statement of Claim from the date of payment out of the account to the date of judgment;

(d) interest on the judgment sum from date of judgment to date of full and final payment;

(e) cost;and

(f) such further relief as is deemed fit by this Honourable Court.

[2] It must be noted that: (i) as early as the year 1985, the Privy Council in the case of *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd and Others* [1985] 2 All ER 947 had, in an immutable term, stated that bank is contractually liable if it honours cheques which are not mandated by the customer, and the bank cannot raise negligence of customer in allowing the state of affairs to happen or to continue unless there is express agreement to contrary which has been clearly brought to the notice of the customer and not purely by general exclusion clauses; (ii) the Privy Council in the judgment did not deal with the defence to bankers like that provided under ss 24 and 73A (73A was only inserted in 1998) of the Bills of Exchange Act 1949 ('BEA 1949') which reads as follows:

Section 24

Subject to the provisions of this Act where a signature on a bill is forged or placed thereon without the authority of the person whose signature it purports to be, the forged or unauthorized signature is wholly inoperative, and no right to retain the bill or to give a discharge therefor or to enforce payment thereof against any party thereto can be acquired through or under that signature, unless the party against whom it is sought to retain or enforce payment of the bill is precluded from setting up the forgery or want of authority:

Provided that nothing in this section shall effect the ratification of an unauthorized signature not amounting to a forgery.

Section 73A

Notwithstanding section 24, where a signature on a cheque is forged or placed thereon without the authority of the person whose signature it purports to be, and that person whose signature it purports to be knowingly or *negligently contributes* to the forgery or the making of the unauthorized signature, the signature shall operate and shall be deemed to be the signature of the person it purports to be in favour of any person who in good faith pays the cheque or takes the cheque for value. (Emphasis added.);

(iii) it must be stated here that the phrase 'negligently contributes' has no relevance to the jurisprudence relating to contributory negligence which relates to sharing of liability. The phrase relates to conduct which is a relevant fact which needs to be taken into consideration under the Evidence Act 1950 to determine absolute defence in respect of the relevant transaction. It must be said here that the phrase 'negligently contributes' is a statutory concept relating to negligence introduced by s 73A; (iv) the Supreme Court had an opportunity

to deal with the Privy Council decision and s 24 of the BEA 1949 in the case of the *United Asian Bank Bhd v Tai Soon Heng* [1993] 1 MLJ 182 and accepted the doctrine of immutability as stamped by the Privy Council notwithstanding the fact that there were cases in the commonwealth jurisdiction which did not subscribe to the immutability concept *per se*, and in cursory manner accepted some narrow exception as advocated in s 24 of the BEA 1949; (iv) by reason of ss 24 and 73A have not been dealt with in a comprehensive manner by the apex court, there was veritable explosion of cases attempting to explain the immutable concept under the contract, and the acceptability of the defence related to negligence and/or its like related to the relevant sections; (v) Justice Nallini Pathmanathan J in an articulate judgment cited as *Malaysia Plastics Sdn Bhd v United Overseas Bank (Malaysia) Bhd* [2012] 4 CLJ 1997 and Justice Lee Swee Seng JC in *Globelink Container Line (M) Sdn Bhd v Bumiputra Commerce Bank Berhad* [2011] MLJU 400; [2011] 1 LNS 414 have captured most of the relevant cases in Malaysia and elsewhere which dealt with the jurisprudence relating to this area of law. Her Ladyship has taken the view that s 73A has statutorily altered or amended the common law position and provides a complete defence to the bank subject to the facts of the case. The learned judicial commissioner has taken the view that s 73A can only go towards mitigating or reducing the damages payable by the defendant in view of contributory negligence of the plaintiff but not to absolve the defendant of a breach of its strict liability not to pay out on a forged cheque.

[3] I must say here that the above two decisions and the cases discussed therein have expressed various views and exposition based on jurisprudence most of which await apex seal to stand as a binding precedent.

[4] It must also be noted that on similar facts as the instant case and involving also the plaintiff, His Lordship Ramly Ali J (as he then was) in *Leolaris (M) Sdn Bhd v RHB Bank Bhd* [2009] 7 AMR 671 has dealt with s 73A of the BEA 1949 and held, inter alia, as follows:

(1) At all times, the defendant had complied with the terms stated with regard to the opening of the plaintiff's current account, namely that with regard to cheques for the amount of RM5,000 and below, a signature of any one of the four signatories as indicated in P4 was sufficient, (see p 674 para 7 line 24 – para 8 line 40)

(2) The evidence also clearly showed that the plaintiff's employee, one Juliana Siew ('Siew') who was not expressly named by the plaintiffs as its authorised representative, had by conduct, represented herself as the authorised representative of the plaintiff to liaise with the defendant on all banking matters in relation to the plaintiff's current account with the defendant. Siew was also named in P4 as the contact person, (see p 674 para 9 line 42 – p 675 para 9 line 7)

(3) In the absence of any letter from the plaintiff appointing or naming an

authorised representative, and from Siew's conduct of liasing with the defendant on all banking matters, it was reasonable for the defendant to infer that Siew was the authorised representative of the plaintiff in relation to banking matters or in respect of the operation of the current account with the defendant, (see p 675 para 10 line 8 – para 11 line 18)

(4) There was no evidence that the defendant received any calls from the plaintiff to stop payment of the cheques, (see 675 para 12 lines 20–30)

(5) On a balance of probabilities, it was clear that the disputed cheques were encashed by the defendant in its ordinary course of business and on good faith. The defendant had complied with all the normal procedures for that purpose and there was no element of negligence or careless conduct by the defendant's officers. Sections 82(1), 85(1) and 95 of the Bills of Exchange Act 1949 (the Act) are sections which apply favourably to the defendant's case, (see p 676 para 16 line 36 – p 677 para 21 line 18)

(6) Any forgery or fraud if at all, was committed by Siew and was contributed to by the plaintiff's own negligence as the plaintiff had failed to supervise Siew and monitor her duties as its accountant/corporate administrator. The plaintiff had also failed to conduct checks on its cheque books which were issued by the defendant and to check all banking transactions carried out with the defendant on a regular basis. In short, the plaintiff had clearly failed to exercise due care in protecting its own interests from any misconduct of its own employees, (see p 677 para 23 line 30 – p 678 para 24 line 18)

(7) Section 73A of the Act which deems a forged or unauthorised signature on a cheque as being a signature of the person it purports to be in favour of the person who in good faith pays the cheque, where the person whose signature it purports to be knowingly or negligently contributes to the forgery or making of the unauthorised signature, was applicable to the facts of the present case, (see p 678 para 26 lines 35–43).

[5] The cases parties have relied on are set out in the annexure to the judgment.

BRIEF FACTS

[6] The plaintiff's case is as adumbrated in the statement of claim as set out above. The defendant's case is set out in encl 45 and reads as follows:

(1) No breach of contract or mandate by the defendant in paying the impugned cheques. The signatures on the cheques were the signatures of one the plaintiff's authorized signatories as shown in the specimen signature card for the plaintiff's account.

(2) The plaintiff's failed to notify the defendant of any discrepancy within 14 days upon receiving the bank statements for the account. Consequently, the plaintiff should be stopped from filing this suit.

(3) The signatures on the impugned cheques should be deemed as valid signatures of the plaintiffs signatories for the account pursuant to Section 73 A of the Bills of Exchange Act 1949. The plaintiffs negligence had facilitated the forgery of the signatures:

(a) The plaintiffs failed to notify the defendant of the alleged forgery from 2.01.2001 to 16.04.2002 (1 years and 3 months);

(b) Only on 11.12.2002, the defendant received a notice of demand from the plaintiffs solicitors regarding the alleged forgery;

(c) The plaintiff failed to inform the defendant of any discrepancy within 14 days from the date the plaintiff received the bank statements;

(d) The plaintiff failed to check its cheque books. If regular checking is done, it would have traced the forgery immediately; and

(e) The plaintiffs signatories should have discovered the forgery upon signing other cheques from the same cheque books.

[7] Learned counsel for the defendant in the reply summarises the plaintiff's case and issues as follows:

3. I have read my learned friend's submission. I believe that I do him no injustice by summarising his arguments as follows:

(a) in so far as the plaintiff's case is concerned, the signatures on the impugned cheques have been proven to be not the signatures of PW2;

(b) regarding the first element of the defendant's Section 73A defence (the plaintiff's negligence facilitating forgery):

(i) there is no proof that the monthly bank statements had been sent to the plaintiff; and

(ii) the plaintiff has no duty to police its own staff;

(c) on the element of the defendant's 'good faith' in making the payment, which is the second requirement of Section 73A, the plaintiff's counsel submits that defendant bank had shut its eyes to the obvious facts of dishonesty and had failed to make inquiries as an honest bank ought to have done.

(d) the plaintiff's counsel criticises the defendant's employees (DW1 to DW14) on the issue of cheques drawn for the sum of RM5,000.00 saying that their testimony does not reflect the actual mandate.

4. I pause here to say that for the purposes of this submission, I will not take issue with the contention that the signatures on the cheques were not the signatures of PW2.

5. Hence, the only issues for Your Lordship's adjudication are:

(a) whether the plaintiff were negligent; and

(b) whether the defendant acted in good faith.

PRELIMINARIES

[8] Four witnesses gave evidence for the plaintiff and 15 witnesses for the defendant. As far as the primary facts are concerned, much of it is undisputed and is similar to the one dealt with by His Lordship Justice Ramly, and has been taken up by counsel in their respective submission in detail and I do not wish to repeat the same.

[9] The cheques honoured were for the mandated sum except one which was withdrawn for the sum of RM35,357. The defendant's defence is two folds. One is that they have a statutory defence under s 73A of the BEA 1949 in that the plaintiff had acted negligently. The other is that the plaintiff is in breach of express contractual terms contained in the monthly statement of account, and in consequence the defendant is relieved from liability.

[10] It must also be noted that the plaintiff at the commencement of trial raised a preliminary issue and that has been adequately dealt in the submission by both parties and I find no merits on the plaintiff's preliminary objection. The factual matrix of the case and the evidence has been set out by the learned counsel for the defendant and much judicial time will be saved if it is repeated. The said factual matrix in encl 48 reads as follows:

13. At all material times, the plaintiff maintained a current account with the defendant's branch in Lucky Garden, Bangsar, Kuala Lumpur.

14. When the account was opened with Bank Bumiputra Malaysia Berhad ('BBMB'), the account number was 1150326914. Subsequently, after the merger of BBMB and Bank of Commerce, the account number was changed to 1427-0003269-05-4.

15. At the material time, the mandate for the account was as follows:

    (a) for amounts up to the sum of RM5,000.00, each cheque must be signed by one (1) director; and

    (b) for amounts exceeding RM5,000.00, each cheque must be signed by two (2) directors.

16. Between 4th January 2001 and 17th April 2002 (a period spanning 15 1/2 months), the defendant bank honoured 248 cheques drawn on the plaintiff's current account (the impugned cheques). The total sum paid out on the cheques amounted toRM 1,091,921.78.

17. The plaintiff alleges that its corporate administrator, one Juliana Siew had forged the signature of John E. Dixon, who was one of the authorized signatories and a director of the plaintiff.

18. The signatures on the impugned cheques looked like the signatures of Mr John E. Dixon.

19. The plaintiff has two (2) addresses:

    (a) No. 6 Jalan Telawi Lima Bangsar Baru, Kuala Lumpur; and

    (b) No 70 & 72 Jalan 27/70A, Desa Sri Hartamas, Kuala Lumpur.

20. The defendant, in its usual course of business, sent monthly bank statements to the plaintiff by ordinary post to the plaintiff's addresses in Bangsar and Desa Seri Hartamas. None of the statements were returned to the defendant, which is an indication that the statements had reached the plaintiff.

21. In clause 4 of the account application form, the plaintiff agrees:

    '… agree to examine the Statement of Account sent to us/me and notify the Bank of any errors, irregularities or discrepancies in the said Statement of Account.'

22. There was no objection by the plaintiff to the defendant within that 15 1/2 month period of time in respect of the transactions recorded in the bank statements.

23. In the same clause 4 of the application form, the plaintiff agrees:

    '… also to notify the Bank if I/we fail to receive such monthly statements …'

24. Plaintiff failed to notify the defendant despite alleging at the trial that it did not receive the bank statements.

25. The sum defalcated by Juliana Siew was close to RM1.1 million, higher than the net profit of the plaintiff in 1999 and approximately 1/3 of its turnover for the same year and higher than the profit before taxation in 2000.

26. For the period from January 2001 to September 2001, only Juliana Siew was entrusted with keeping the cheque books and drawing the cheques even though she was only a corporate administrator.

27. Nobody in the plaintiff company supervised Juliana Siew. She reported to the Board of Directors. None of the directors were executive directors.

28. Cheong Lai Hoong @ Christine (PW3) had been appointed as the plaintiff's account executive from October 2001. She had access to the plaintiff's cheque books and cheque stubs. She also drew cheques on behalf of the plaintiff on regular basis. Despite this, only in July 2012, the fraud was discovered.

29. At the material time, PW3, as the plaintiff's sole account executive prepared and presented to the plaintiff's board of directors the management accounts showing inter alia, inflow and outflow of the plaintiff's funds, without checking and/or sourcing the bank statements.

30. PW3 made no attempt to verify the particulars shown on the cheques stubs in the custody of the plaintiff, despite having access to these documents.

[11] I have heard the evidence, read the documents and submission of the parties in detail. Both learned counsel have provided a detailed submission relating to the facts, evidence, and law. The court is grateful. I do not wish to repeat the same save to deal with the core issues. After having given much consideration to the submission of learned counsel for the plaintiff, I take the view that the plaintiff's claim must be allowed only as to the part in respect RM35,357 with interest. My reasons, inter alia, are as follows:

(a) It must be said that the Privy Council's decision in *Tai Hing Cotton Mills Ltd* has been widely followed in many jurisdiction in relation to the contractual duty between the bank and customer. And the issue of negligence of the customer was seen as no answer for wrongful payment on forged cheques unless it was otherwise agreed. The position is similar in India. The Supreme Court of India in *Canara Bank v Canara Sales Corpn* AIR 1987 SC 1603 has dealt with the jurisprudence relating to forged cheques and other relevant cases inclusive of the Privy Council's decision. The learned author of *Tannan's Banking Law and Practice in India*, (22nd Ed), 2008 at p 411 says:

> In *Canara Bank v Canara Sales Corpn* (supra), the Supreme Court held that the bank cannot debit the amount of forged cheques to the customer's account. The bank cannot expect the customer to look into the pass-book or the statement of account so minutely. The statements sent by the bank are either not readable, decipherable or legible. The relation between the banker and customer is based on trust and when forged cheques are presented for payment, there is no duty for the customer to inform the bank about the fraud committed of which he has no knowledge. The customer can be held liable only when the customer had the knowledge about the fraud. Mere inaction on the part of the customer cannot absolve the bank from its liability to the customer and that by itself cannot cast a liability on the customer. The Court did not accept the bank's contention that when the customer had confirmed the balance in his account and also does not raise objection as to the statement of account then the entries should be deemed to be final and such entries cannot be re-opened for reconstruction.

(b) It must be noted that in India they have a similar provision like s 24 of the BEA 1949, and they have recognised the limited exception to the common law position. The learned author of *Tannan's Banking Law and Practice in India* at p 520 says:

> The legal position in respect of a cheque bearing a forged signature purporting to that of the drawer, is very ably summarised by Ramaswamy, J. in *Abbu Chettiar v Hyderabad State Bank* (1954) 14 Com Cases 221; AIR 1954 Mad 1001:

> (i) It is for the customer to establish affirmatively that the signature on the disputed cheque is not that of the customer but a forgery, (ii) If the drawer's cheque is forged or unauthorised however clever to forgery is, the banker cannot debit his customer's account in case he pays the sum unless he establishes adoption or estoppels, (in) What amounts to adoption or estoppels is dependent upon the circumstances of each case, (iv) In order to make the customer liable for the loss the neglect on his part must be in or intimately connected with the transaction itself and must have been the proximate cause of the loss, (v) The banker cannot set-up wither estoppel or adoption if his own conduct or negligence has occasioned or contributed to the loss, the well-settled principle being that where one of two innocent parties must suffer for the fraud of a third that party should suffer whose negligence facilitated the fraud.

(c) In *Khoo Tian Hock & Anor v Oversea-Chinese Banking Corporation Limited* [2000] 4 SLR 673, the Singapore court had an opportunity to consider the proposition stated in the Privy Council case. On the facts, the court found that the customer had breached the contractual duty of care and in consequence, refused to follow the Privy Council decision. And the Singapore Court, inter alia, held that:

> As for the plaintiffs, they as customers, owed the defendant bank a general duty not to facilitate fraud which duty extended beyond the mere drawing of cheques. This duty arose as an implied term in the contract between a bank and its customers. From there, the court then considers on the facts of each case, whether there was a breach of that duty and if so, whether the breach caused the loss. The position enunciated in *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank & Ors* [1986] AC 60 that a customer's duty was limited to (i) exercising due care in drawing cheques so as not to facilitate fraud or forgery and (ii) notifying the bank immediately of any unauthorised cheques of which he had become aware, and further that there was no wider duty on a customer to prevent forged cheques from being presented to his bank for payment should not be followed because to do so would mean that a customer was entitled to sue his bank with impunity regardless of the most reprehensible negligence on his part which could not be right even though the business of banking was that of the bank and not the customer.

(d) In India or Singapore, there is no equipollent section to s 73A of the BEA 1949. In addition, it must be said that the Privy Council's decision did not exclude contractual duty not to commit negligent act or its like when the contract expressly provides for not to do such act or neglect. If there is a legal duty of care, breach of it may give rise to cause of action in contract as well as negligence, as negligence strictly means the breach of legal duty to take care (see *Skyring v Greenwood* (1825) 4 B & C 281). The Privy Council's decision did not exclude such a contractual duty, and at p 957 rejecting the implied term submission had this to say:

Their Lordships do not believe that there is anything to the advantage of the law's development in searching for a liability in tort where the parties are in a contractual relationship. This is particularly so in a commercial relationship. Though it is possible as a matter of legal semantics to conduct an analysis of the rights and duties inherent in some contractual relationships including that of banker and customer either as a matter of contract law when the question will be what, if any, terms are to be implied or as a matter of tort law when the task will be to identify a duty arising from the proximity and character of the relationship between the parties, Their Lordships believe it to be correct in principle and necessary for the avoidance of confusion in the law to adhere to the contractual analysis: on principle because it is a relationship in which the parties have, subject to a few exceptions, the right to determine their obligations to each other, and for the avoidance of confusion because different consequences do follow according to whether liability arises from contract or tort, eg in the limitation of action. Their Lordships respectfully agree with some wise words of Lord Radcliffe in his dissenting speech in *Lister v Romford Ice and Cold Storage Co Ltd* [1957] AC 555. After indicating that there are cases in which a duty arising out of the relationship between employer and employee could be analysed as contractual or tortious Lord Radcliffe said at p 587:

> Since, in any event, the duty in question is one which exists by imputation or implication of law and not by virtue of any express negotiation between the parties, I should be inclined to say that there is no real distinction between the two possible sources of obligation. But it is certainly, I think, as much contractual as tortious. Since in modern times the relationship between master and servant, between employer and employed is inherently one of contract, it seems to me entirely correct to attribute the duties which arise from that relationship to implied contract.

Their Lordships do not, therefore, embark on an investigation as to whether in the relationship of banker and customer it is possible to identify tort as well as contract as a source of the obligations owed by the one to the other. Their Lordships do not, however, accept that the parties' mutual obligations in tort can be any greater than those to be found expressly or by necessary implication in their contract. If, therefore, as their Lordships have concluded no duty wider than that recognised in *Macmillan* [1918] AC 777 and *Greenwood* [1933] AC 51 can be implied into the banking contract in the absence of express terms to that effect, the banks cannot rely on the law of tort to provide them with greater protection than that for which they have contracted.

(e) In my view, s 73A was introduced to arrest the immutable concept advocated by the Privy Council and introduce statutory defence to the bank in case of negligent contribution (negligently contributes) as opposed to negligence *per se* thereby making an inroad into the common law position that negligence of the customer *per se* will not stand as a defence unless it is contractually provided for. The distinction between the concept of negligence and 'negligently contributes' must be

distinguished. This is reflected in the *Hansard* where the Deputy Finance Minister in introducing the Amendment Bill in 1997, had this to say:

RANG UNDANG-UNDANG BIL PERTUKARAN (PINDAAN) 1997

Bacaan Kali Kedua dan Ketiga

Timbalan Menteri Kewangan

[Dato' Dr. Affifudin bin Haji Omar]:

Tuan Yang di-Pertua, saya mohon mencadangkan iaitu Rang Undang-undang bernama suatu rang undang-undang Akta Bil Pertukaran (Pindaan) 1997 iaitu satu akta untuk meminta Akta Bil Pertukaran 1949 dibacakan untuk kali yang kedua.

Tuan Yang di-Pertua, Akta Bil Pertukaran 1949 iaitu Akta 204 merupakan perundangan yang tunggal di Malaysia yang memperuntukkan rangkaian undang-undang mengenai instrumen-instrumen boleh niaga seperti bil pertukaran, cek dan nota janji. Selain daripada itu, akta ini adalah juga rangka perundangan asas bagi urusan bank dan sistem pembayaran di Malaysia. Maka selaras dengan perubahan-perubahan yang berlaku dalam sistem penjelasan cek dan urusan bank, peruntukan-peruntukan Akta Bil Pertukaran 1949 perlu diubahsuaikan …

… Salah satu lagi cadangan pindaan adalah berhubungan dengan isu tandatangan palsu atau tandatangan yang telah diperbuat tanpa kuasa pada cek. Suatu bank yang membuat bayaran atas suatu cek yang mengandungi tandatangan palsu adalah bertanggungan sepenuhnya bagi kerugian yang ditanggung oleh pelanggannya. Ini adalah berdasar prinsip bahawa bank tersebut tidak mempunyai mandat secara nyata atau tersirat untuk membuat bayaran tersebut. Prinsip undang-undang di Malaysia dalam hal ini adalah berdasarkan kepada Common Law. Seseorang pelanggan hanya mempunyai dua kewajipan kepada banknya iaitu:-

(i) ditegah daripada menulis ceknya dengan cara yang memudahkan penipuan atau pemalsuan; dan

(ii) memaklumkan kepada banknya tentang apa-apa pemalsuan cek dari akaunya dengan seberapa segera setelah ia mengetahui mengenai pemalsuan tersebut.

Berdasarkan prinsip di atas, pelanggan bank tidak mempunyai kewajipan untuk mengambil langkah berhati-hati dalam pengurusan am perniagaanya untuk mencegah pemalsuan oleh kakitangannya. Seorang pelanggan juga, tidak mempunyai kewajipan untuk memeriksa penyata bulanan bank untuk memastikan bahawa akaunnya dikendalikan secara wajar dan patut.

Dalam menentukan liabiliti bank dalam hal ini, fakta bahawa pelanggan tersebut telah bertindak secara cuai sehingga memudahkan pemalsuan tersebut adalah tidak material. Bank Negara Malaysia berpendapat, bahawa risiko yang harus ditanggung oleh suatu bank semasa membuat pembayaran atas sesuatu cek yang mengandungi tandatangan palsu atau yang telah

A diperbuat tanpa kuasa perlu dibataskan. Batasan yang dicadangkan berbangkit dalam keadaan di mana tandatangan palsu atau yang telah diperbuat tanpa kuasa tersebut berpunca daripada kecuaian atau tindakan pelanggan yang disengajakan iaitu dengan tujuan untuk memudahkan pemalsuan tandatangan atau pembuatan tandatangan tersebut tanpa kuasanya.

B

Bank Negara Malaysia mendapati bahawa Uniform Commercial Code (UCC) di Amerika Syarikat mempunyai peruntukan yang menghalang seseorang daripada menidakkan kesahan cek tersebut sekiranya pindaan secara material terhadap cek atau tandatangan yang telah dibuat tanpa kuasanya akibat daripada kecuaiannya sendiri. Sehubungan dengan itu, adalah dicadangkan supaya pindaan yang menyerupai peruntukan UCC tersebut dibuat kepada akta.

C

Tuan Yang di-Pertua, secara ringkasnya pindaan-pindaan yang dicadangkan adalah perlu:

D

(i) memastikan pelaksanaan sistem penjelasan imej cek kebangsaan di mana pengemukaan cek dibuat melalui sistem imej;

(ii) menyeragamkan undang-undang dan menjelaskan apa-apa konflik berkenaan cek yang dipalang akaun penerima dengan memperuntukkan bahawa cek yang dipalang akaun penerima tidak boleh dipindahmilik; dan

E

(iii) membataskan liabiliti bank pembayar dalam hal cek yang mengandungi tandatangan palsu atau yang diperbuat tanpa kuasa sekiranya tuan punya cek itu sendiri dengan sengaja telah bertindak secara cuai dan mempermudahkan pembuatan tandatangan palsu tersebut.

F

Tuan Yang di-Pertua, saya ingin membawa perhatian Dewan yang mulia ini kepada beberapa pindaan utama yang dicadangkan.

G

Fasal 2 bertujuan untuk mengadakan peruntukan baru Seksyen 73A. Peruntukan baru ini bertujuan untuk mengadakan peruntukan berhubungan dengan liabiliti bank pembayar dalam hal cek yang mengandungi tandatangan palsu atau yang diperbuat tanpa kuasa.

Sekiranya tandatangan palsu atau yang diperbuat tanpa kuasa adalah berpunca daripada kecuaian atau ketindakan yang disengajakan sehingga memudahkan pemalsuan atau tandatangan tersebut dibuat tanpa kuasa maka tandatangan tersebut akan disifatkan sebagai tandatangan orang yang cuai tersebut.

H

(f) Section 73A totally does not oust the common law position. If Parliament intended that it would have expressly stated so. The protection afforded to the customer at common law is still sustainable but with some restrictions. For example: (i) if a cheque has been forged the bank is liable (this part may relate to negligence); (ii) if the bank sends statement on monthly basis and the customer does not identify the

I

discrepancy in the first, second or third month etc (this is where the phrase 'negligently contributes' becomes operative), and allow the state of affairs to continue depending on the facts of each case, the bank may be able to rely on the statutory defence in respect of the relevant transaction provided it can satisfy the requirement set out in the section. It is not negligence per se that attaches liability but negligent contribution which causes the loss provides the defence reversing the common law position. In essence, a customer who is vigilant in checking the bank statement regularly need not fear if the cheque has been forged provided he complains within a reasonably time to arrest the continuing forgery.

(g) For purpose of clarity in respect of the above examples, it must be said that if the customer has been taken ill such as stroke or coma and is not in a position to check the monthly statement and inform the bank of any forgeries and even if it has been happening for a number of years, the bank may be liable as negligent contribution will not become operative on such facts even though there may be negligence in the conduct of the business affairs of the customer. In essence, it is a question of fact for the court to decide. I must say here again the Act says 'negligently contributes' and it must not be taken to read as contributory negligence. The difference is like apple and orange. Contributory negligence relates to sharing of liability. On the other hand, 'negligently contributes' relates to promoting a negligent act, or its like. If the bank can show that there was in fact negligent contribution on the part of the customers taking into consideration the circumstances of the case and the bank had paid out in good faith, the section will provide an absolute defence to a customer's claim in respect of the relevant transaction.

(h) Section 73A directly and/or indirectly has brought in a wider concept of duty requiring a customer to take reasonable precautions in the management of his business to prevent forgery and also a duty to check periodical bank statements and alert the bank to arrest forgery at the earliest opportunity failing which the bank may succeed by raising the s 73A defence, notwithstanding the decision of the Privy Council which was encapsulated by our Supreme Court in *United Asian Bank Bhd*. In addition, any clauses express or implied which imposes duty on the customer not to be negligent or its like have to be given greater force and effect by the court in view of s 73A which alters and amends the common law position to negate absolute liability on the bank unless the customer has acted diligently and reasonably on the facts and circumstances of the case. The Singapore case stated above has diligently reviewed all authorities in this area of jurisprudence in meticulous detail to find in favour of the bank, and that too to support the proposition that contractually a customer has an implied duty not to facilitate fraud. And the court had this to say:

> 223 I would add that I do not think that banks in Singapore are reluctant

to add such a contractual term because of the fear of losing business. More often than not, the omission to do so is because they have not revised their standard terms or because another bank has been taken over by or merged with them and they have omitted to revise the standard terms of that other bank. It may well be that one should have no sympathy for a bank who fails to get its act together, but, on the other hand I do not see why customers should get away with their conduct however negligent or reckless they may have been.

224 As for the policy reason that the losses of the kind sustained are infinitesimal to banks compared with the large business they do whereas to the individual customer the loss would often be very serious, I am of the view that such a consideration can be addressed by not being too quick to find that the customer has been negligent or that the negligent conduct has caused the loss.

225 In my view, the balance between the interests of the bank and the customer and the interests of justice would best be served if there is a wider duty of care but leaving the questions of negligence and causation to be determined according to the particular facts of each case.

(i) In the instant case, there was sufficient evidence that the monthly bank statements were regularly sent. There was also contractual obligation in express term for the plaintiff to examine the statement of account and notify the bank of any errors, or irregularities or discrepancies. Similar reminder was also stated in the monthly bank statements. The evidence was clear that the plaintiff notwithstanding the contractual obligation has failed to take reasonable precautions in the management of the business to prevent continuing forgery and alert the bank to avoid s 73A defence by the bank. The issues relating to negligent contribution by the plaintiff is well articulated by learned counsel for the defendant and, inter alia, read as follows:

(a) the forgeries were not detected for the extraordinarily long period of 15 1/2 months;

(b) the amount defalcated was close to RM1.1 million, higher than the net profit of the plaintiff in 1999 and approximately 1/3 of its turnover for the same year - for this not to be noticed is indicative of the plaintiff's lackadaisical attitude;

(c) no one in the plaintiff company supervised Juliana Siew's handling of the plaintiff's cheques and there was no checks and balances insofar as she was concerned;

(d) no complaints were made to the defendant although the defendant sent the plaintiff bank statements on a monthly basis;

(e) if the bank statements did not reach the plaintiff, the plaintiff failed to notify the defendant at the material time despite its agreement in the account application form;

(f) the plaintiff accepted in toto Juliana Siew's illogical explanation that the 'absence' of the bank statements for 15 1/2 months was due to the bank's merger;

(g) for the period from January 2001 to September 2001, only Juliana Siew was entrusted with keeping the cheque books and drawing the cheques even though she was only a corporate administrator;

(h) although one Cheong Lai Hoong @ Christine had been appointed as the plaintiff's account executive from October 2001 with access to the plaintiff's cheque books and cheque stubs and drew cheques on behalf of the plaintiff on regular basis, the fraud was only detected in July 2012;

(i) at the material time, every month Christine prepared and presented to the plaintiffs board the management accounts showing inter alia, inflow and outflow of the plaintiff's funds, without checking and/or sourcing the bank statements;

(j) no attempt was made by Christine to verify the particulars shown on the cheques stubs in the custody of the plaintiff;

(k) there was no internal check and balance mechanism to prevent abuse and misuse of the plaintiff's cheques; and

(l) there was a systemic failure in the plaintiff's organization facilitating the perpetration of the fraud for 15 1/2 months in a very large amount.

(j) I am in total agreement with learned counsel for the defendant that the plaintiff had knowingly or negligently contributed or facilitated the forgery and thereby made out a case to rely on one part of the statutory defence encapsulated in s 73A. In respect of the other part relating to good faith in paying out the cheque, I am satisfied that the defendant has a system in place and has conducted themselves as a reasonable and prudent banker dealing with the day-to-day affairs of the operation of the accounts of the plaintiff taking into account all the circumstances of the case and also the fact that villain, Juliana Siew, is not an unknown person to the plaintiff or the defendant in the day-to-day operation and conduct of the plaintiff's business. And also the fact that the Act itself places a low threshold for the defendant to satisfy when relying on the term good faith. This is so because s 95 of the BEA 1949 defines good faith as follows:

> A thing is deemed to be done in good faith, within the meaning of this Act, where it is in fact done honestly whether it is done negligently or not.

(k) It must be noted that when it relates to instruments relating to Bills of

Exchange the threshold requirement for good faith in English Law is very low, that is to say, once it is established that the holder took the instrument in good faith, he is entitled to all the rights of a holder in due cause notwithstanding that he was careless, that he made no enquiry, and that he was informed of facts which would have led a reasonable man to make further inquiry, provided, however, that he had no notice of any defect in the transferor's title (see *Jones v Gordon* (1877) 2 App Cas 616; *Auchteroni & Co v Midland Bank, Ltd* [1928] All ER Rep 627).

(l) I agree with learned counsel for the plaintiff that the cheque honoured for the sum of RM35,357 found at p 114 of encl 37 does not have two signatories and in that respect it is a breach of mandate given by the plaintiff and in consequence, the defendant is liable to reimburse the same with interest, and s 73A defence will not assist the defendant.

[12] For reasons stated above, I allow the plaintiff's claim in part for the sum of RM35,357 with interest at 5%pa from the date of filing to the date of judgment and thereafter at the rate of 5%pa from the date of judgment to the date of realisation. I make no order as to costs.

[13] I hereby order so.

Claim only allowed for sum of RM35,357 with interest and with no order as to costs.

Reported by Ashok Kumar